



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC. MISC. NO. 198 OF 2014

MARY NJERI NGUGI & LUCY WAMBUI NGUGI
(SUING AS ADMINISTRATORS OF THE ESTATE OF

HARRISSON NGUGI NGANGA (DECEASED).....PLAINTIFF

VERSUS

JOEL KIMAMA NGANGA1ST DEFENDANT

FRANCIS MBUGUA MWIHIA.....2ND DEFENDANT

JAMES MWANGI GACHERU.....3RD DEFENDANT

LAND REGISTRAR - THIKA.....4TH DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 4th May 2015 in which the Intended Appellants/Applicants seek for leave to file an appeal out of time against the Judgment of Hon. M.W. Mutuku (SPM) delivered on 13th March 2015 in **CMCC No. 39 of 2004** in the Thika Law Courts, that the Honourable Court order stay pending the hearing and determination of the appeal and that the Notice of Appeal and Memorandum of Appeal annexed be deemed as duly filed and served.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of one of the Intended Appellants, Mary Njeri Ngugi, sworn on 4th May 2015, in which she averred that she is the 1st wife of Harrison Ngugi Nganga (now deceased) and a co-administrator of his estate together with her co-wife Lucy Wambui Ngugi. She averred further that their late husband filed **HCCC No. 1181 of 1997** at the Nairobi High Court which was later transferred to Thika Magistrates Court as **CMCC No. 39 of 2004**. She further averred that during that suit, their husband died in the year 2000 and both she and her co-wife substituted him in that claim. She added that on 13th March 2015, Judgment was entered in that suit in favour of the 3rd Defendant's Counterclaim. She further stated that on the same date, she received a letter from the 3rd Defendant's Advocates giving them 30 days' notice to vacate the suit property. She averred further that being dissatisfied with the said judgment, they appointed the current advocates on record to lodge an appeal. She further stated that their said Advocates informed them that

the time for lodging an appeal had already lapsed. She added that their said Advocates nevertheless proceeded to request for a copy of the judgment and proceedings to be availed for the purpose of lodging an appeal out of them by way of their letter dated 23rd March 2015. She added that such documents were only availed on 10th April 2015. She then stated that she instructed their Advocates to lodge this Application. She added that the delay occasioned herein is not so inordinate as to be inexcusable and she requested the court to so find.

The Application is contested. The 3rd Defendant/Respondent filed his Replying Affidavit sworn on 25th May 2015 in which he averred that the Intended Appellants/Applicants learnt of the delivery of the Judgment almost immediately as his Advocates letter informing them of the same was dated 13th March 2015, that is the date of the Judgment but that they delayed in instructing their Advocates to file an Appeal by 10 days, that is to say on 23rd March 2015. He added that even after obtaining a certified copy of the Judgment on 10th April 2015 the Applicant's Advocates had 3 days to file the Memorandum of Appeal but did not do so. He noted that this Application was filed on 5th May 2015. He averred further that this Application and the intended appeal are only meant to perpetuate the delay in his taking possession of his piece of land which he purchased more than 20 years ago in 1994. He further stated that as a consequence he has been unable to harvest the tea crop on the suit land for over 20 years and has suffered loss running into millions of shillings. He further expressed doubt that the Applicants have the financial capacity to pay him mesne profits as awarded by the lower court in the Judgment. He stated that every day that passes after the Judgment he continues to painfully bear the loss of use of his piece of land. He further noted that the Applicants have not even proposed some form of security that they would be prepared to make in order to safeguard his interest in the piece of land.

The first issue that I have to determine is whether or not to extend the time for the Applicants to file their Appeal. The power to extend time is discretionary. To my mind, I consider that the important factor to consider is whether or not the delay in filing the Appeal is unreasonable. Delay was discussed in the case of **Agip (Kenya) Ltd versus Highland Tyres Limited (2001) KLR 630** as follows:

“Delay is a matter to be decided on the circumstances of each case where a reason for the delay is offered. The court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit.”

Having regard to this matter, while the Judgment was delivered on 13th March 2015, the Intended Appellants/Applicants did not file their Appeal in the allowed time of 14 days after delivery. It is noteworthy that they did write to the court 10 days later that is on 23rd March 2015 seeking a certified copy of the Judgment and the typed proceedings. As they stated, they received these on 10th April 2015 and subsequently filed this Application on 4th May 2015. My finding is that there was no unreasonable delay on the part of the Applicants in filing this Application seeking extension of time. To that extent therefore, I will and do hereby extend the time for filing the Appeal. The annexed Notice of Appeal and the Memorandum of Appeal shall be deemed as duly filed.

The other issue arising for my determination is whether or not to grant an order of stay of execution pending the hearing and determination of the Appeal. The applicable law on this issue is **Order 42 rule 6(1) and (6)** of the **Civil Procedure Rules, 2010** which states as follows:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

Order 42 Rule 6(2) provides as follows:

“No order for stay of execution shall be made under subrule (1) unless –

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

On the issue of whether the Appellants/Applicants stand to suffer substantial loss if the order of stay is not granted, I rely on the position taken by the court in **Machira t/a Machira & Co vs. East African Standard No.2 (2002) 2 KLR 63** where it was held that:

“It is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory. That will not do. If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an award or decree or order, before disposal of the applicant's business (eg appeal or intended appeal)”

In this Application, the Appellants/Applicants have stated that they do reside and have resided on the suit premises for well over 20 years. It is not disputed that the suit premises is their livelihood too. In these circumstances, having them evicted out of the suit premises before their appeal is heard and determined shall no doubt occasion them substantial loss and I do so find. As I have already found earlier, I find that the Appeal was lodged without unreasonable delay. The final point to consider is the form of security that the Appellants/Applicants should give to the 3rd Respondent as may ultimately be binding on them should the 3rd Respondent succeed in this Appeal. I have taken careful note of the assertions by the 3rd Respondent that he has waited for well over 20 years to obtain the suit premises from the Appellants/Applicants. He asserted that since he bought the same, he has never got access to the suit premises and has suffered grave losses going into millions of shillings. While the issue of ownership shall be the subject of the Appeal, I consider that the Appellants/Applicants should put up security to the 3rd Respondent as a condition for staying execution of the Judgment. To that extent therefore, I do grant the sought after order of stay of execution on condition that the Appellants/Applicants do pay into court the sum of Kshs. 1 million within 30 days from the date of delivery of this Ruling as security should they lose the Appeal failing which the 3rd Respondent is at liberty to execute the Judgment delivered on 13th March 2015.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF JANUARY 2017.

MARY M. GITUMBI

JUDGE